83-557

No.

In The

Supreme Court of the United States

October Term, 1983

Fred Behul and Erma Behul,

Respondents,

vs.

Walter Regal and Ingrid Regal,
d/b/a/ Regal Crest Village of Brookfield,

Petitioners,

and

Daniel Trout.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Kenneth R. Loebel
Michael J. Jassak
(Counsel of Record)
Habush, Habush & Davis, S.C.
First Wisconsin Center
Suite 2200
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Phone: 414-271-0900
Attorneys for Petitioners

QUESTION PRESENTED

1. Whether an owner of rental property can be held liable for punitive damages under 42 U.S.C. Section 1982 where no evidence was introduced at trial which showed that the owners knew or should have known of their on-site rental agent's wrongdoing, where the evidence indicated that the owners had no contact whatsoever with the rental applicants, and where there was no evidence that the owners authorized, ratified or fostered the discrimination complained of, in any fashion other than their failure to post a HUD "Equal Housing Opportunity" poster in the building lobby.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases:

Statutes:

No.

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Petitioners, Walter and Ingrid Regal, respectfully petition for a Writ of Certiorari to review that portion of the Judgment of the United States Court of Appeals for the Seventh Circuit which affirms and upholds the punitive damage award made by the jury against the petitioners in the amount of $25,000.00.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

The Judgment entered by the United States District Court for the Eastern District of Wisconsin was affirmed by unpublished Order dated July 6, 1983 issued by the United States Court of Appeals for the Seventh Circuit. A copy of the Order is reprinted in the Appendix at pages A-1 through A-8. Judgment was entered by the United States Court of Appeals on July 6, 1983. Said Judgment is reprinted in the Appendix at page A-9.

JURISDICTION

The Order of the Court of Appeals was entered on July 6, 1983. Petition for Rehearing with Suggestion for Rehearing en banc of defendants-appellants, Walter Regal and Ingrid Regal, d/b/a/ Regal Crest Village of Brookfield, timely filed, was denied on August 2, 1983. (Said Order is reprinted in the Appendix at pages A-10 through A-11.)

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

42 U.S.C. Section 1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

STATEMENT OF THE CASE

A. Procedural

This is an action to redress racial discrimination in the provision of rental housing brought pursuant to 42 U.S.C. Section 1982. Jurisdiction was conferred upon the United States District Court pursuant to 28 U.S.C. Section 1343(4). Respondents, Erma and Fred Behul, allege that they were deprived of their right to negotiate, contract for and rent property without regard to race. The Behuls' claim relates to events which occurred on May 20, 1979 when they visited Regal Crest Village of Brookfield and sought rental information. Petitioners, Walter and Ingrid Regal, are the owners of Regal Crest Village, an 84-unit apartment complex located in the City of Brookfield, Wisconsin, a virtually all-white suburb of Milwaukee, Wisconsin. Daniel Trout was the on-site rental agent employed by the Regals.

The matter was tried to a jury of seven commencing on June 1, 1982 and ending with the return of a verdict on June 4, 1982. In its verdict, the jury found that the defendants refused to rent or negotiate with the Behuls for the rental of an apartment, that race was a factor in the refusal to rent, and that both Fred Behul and Erma Behul were entitled to compensatory damages in the amount of $2,500.00. In addition, the verdict returned by the jury found that each of the defendants had acted maliciously, wantonly or oppressively toward the plaintiffs. Punitive damages in the amount of $12,500.00 were awarded to the plaintiffs against both Walter Regal and Ingrid Regal. Punitive damages in the amount of $5,000.00 were awarded against Daniel Trout.

Defendants, pursuant to F.R.C.P. 50(b), moved the Court to set aside the verdict and to enter judgment in favor of the defendants in accordance with defendants' motion for directed verdict made during the course of the trial.

The trial court issued a Decision and Order dated October 27, 1982 in which it denied defendants' motion without reference to any supporting evidence. In pertinent part, said Order provided as follows:

> The defendants' seek judgment notwithstanding the verdict claiming that the evidence did not support the verdict. Defendants argue that the evidence at trial conclusively shows that the defendants did not refuse to rent or to negotiate with the plaintiffs for the rental of an apartment. *Defendants further argue that there is no evidence indicating that defendants Walter Regal and Ingrid Regal acted maliciously, wantonly or oppressively toward the plaintiffs, so that punitive damages against those defendants was unjustified.*
>
> In a detailed special verdict, the jury specifically found that the defendants or their agents did refuse to rent an apartment to the plaintiffs and that Walter Regal and Ingrid Regal did act maliciously, wantonly or oppressively toward the plaintiffs. *Having heard the evidence presented to the jury, this Court cannot agree that there was no evidence to support these findings of the jury.* Therefore, defendants' motion for judgment notwithstanding verdict will be denied. (emphasis added)

The defendants appealed to the United States Court of Appeals for the Seventh Circuit. By unpublished Order dated July 6, 1983, the United States Court of Appeals for the Seventh Circuit affirmed the Decision of the United States District Court for the Eastern District of Wisconsin. Judgment was entered by the Seventh Circuit on July 6, 1983. Petitioners Walter and Ingrid Regal filed a Petition for Rehearing with Suggestion for Rehearing en banc of the Order dated July 6, 1983 insofar as said Order affirmed and upheld the punitive damage award made by the jury in the amount of $25,000.00 against the Regals. By Order dated August 2, 1983, the United

States Court of Appeals for the Seventh Circuit denied the Petition for Rehearing.

B. The Facts

The Behuls' claim relates to events which occurred on May 20, 1979 when Fred and Erma Behul visited Regal Crest Village of Brookfield and sought rental information. The Behuls had returned to the Milwaukee area in the late spring of 1979 (May 19, 1979), for the purpose of setting up a home and seeking employment. On Sunday, May 20, 1979, the Behuls began their search for an apartment.

After looking very quickly at some apartments on the east side of Milwaukee, the Behuls transferred their search to the west side and went to Regal Crest Village in Brookfield. Mr. and Mrs. Behul first arrived at the apartment complex at approximately 10:30 in the morning and observed a sign outside the manager's office which indicated that the rental office would not be open until noon. As a result, the Behuls walked around the Regal Crest premises and conducted their own visual inspection. Shortly after noon, the Behuls returned to Regal Crest and rang the manager's doorbell. The Behuls were originally met by Mrs. Trout who advised them that her husband was busy and that he would be with them in a few minutes. Fred Behul testified that when Mr. Trout arrived, his wife advised Mr. Trout that they were interested in a two-bedroom apartment and that Mr. Trout indicated that none were available. Mr. Behul further testified that his wife then inquired as to other size units and Mr. Trout once again advised that none were available. At this point, Mr. Trout inquired, according to Mr. Behul, as to when the Behuls needed their apartment. In response to this question, the Behuls indicated that their furniture was on a van which was sitting outside of their mother's home and they wished to establish a residence as quickly as possible. The record is clear that the Behuls communicated a demand for immediate occupancy of a rental unit. At the very latest, June 1 would have been acceptable to their

needs. Because of their unique situation, they were not interested in an apartment which would not be available on or before June 1, 1979.

Mr. Behul testified that he never had any contact with Mr. and Mrs. Regal and that he had no personal knowledge of directions or specific instructions which they may have given to their rental managers concerning rental practices.

Mrs. Behul testified in a similar fashion with respect to her initial contact with Mr. Trout. She indicated that she expressed a preference for a two-bedroom unit to which Mr. Trout responded that none were available and then inquired as to other size units. Mr. Trout informed her that he had no other units available. Mrs. Behul also testified that it was at this time that Mr. Trout inquired as to the timing of their rental needs. Both Mr. and Mrs. Behul testified that their needs were immediate and that because of the unique factual situation they found themselves in, they needed to find an apartment that was available for occupancy no later than June 1, 1979.

Mrs. Behul testified that she had no previous contact with the Regals and had no personal knowledge of any instructions or specific directions which the Regals may have given to their rental manager concerning rental practices.

In addition to the testimony of the Behuls, the plaintiffs produced testimony from testers sent by the Milwaukee Fair Housing Council to Regal Crest Village during the period March, 1979 through October, 1979. The Milwaukee Fair Housing Council was in the process of conducting tests at the Regal Crest Apartments which were totally unrelated to the visit by the Behuls. The testing experiences which the trial court allowed to be introduced into evidence occurred on the following dates:

March 14, 1979;
May 23, 1979;

September 27, 1979; and
October 1, 1979.

In each case, the testing sequence which was testified to was similar. A white and black tester traveled to Regal Crest Village and sought rental information. The first test occurred on March 24, 1979. Helen Harris, a black tester, inquired about a two-bedroom apartment. Ms. Harris dealt only with Daniel Trout and was told that there might be a June vacancy. Carol Manternach, a white tester, also sought rental information on March 24, 1979. Mrs. Manternach dealt only with Mr. Trout and received several follow-up phone calls from Mr. Trout subsequent to her visit to Regal Crest Village. Neither Ms. Harris nor Ms. Manternach had any knowledge as to the events which occurred on May 20, 1979 when the Behuls visited the apartment complex. Neither had any contact with the Regals.

The second test occurred on May 23, 1979, just three days after the visit by the Behuls. Shirley Davis, a black tester, visited with Mr. Trout on May 23, 1979 and communicated a need for a two-bedroom apartment as soon as possible. Mr. Trout advised her, as he had advised the Behuls just three days earlier, that he had no vacancies. Further, Mr. Trout indicated that there would be nothing available until July 1 at the earliest. Susan Matthies, a white tester, also visited with Mr. Trout on May 23, 1979. Ms. Matthies also requested a two-bedroom as soon as possible. Mr. Trout called back Ms. Matthies on July 20, 1979 and advised her that there might be an opening around the 1st of September. Neither Ms. Davis nor Ms. Matthies had any knowledge as to the matters which occurred on May 20, 1979 during the Behul visit. Neither had any contact with the Regals.

The third test occurred on September 27, 1979 when Ruby Jones, a black tester, saw Mr. Trout about a two-bedroom apartment. Ms. Jones was told that there was nothing available until December, 1979 by Mr. Trout. Sandra Hamberlin, a white

tester who also visited on September 27, 1979 and inquired about a two-bedroom apartment, was told by Mr. Trout that there might be an available unit in November. Neither Ms. Jones nor Ms. Hamberlin had any personal knowledge of the events which occurred on May 20, 1979 during the Behuls' trip to Regal Crest Village. Neither had any contact with the Regals.

Test number four occurred on October 1 and 2, 1979. Quincy Hawkins, a black tester, inquired as to a two-bedroom apartment on October 1, 1979. Mr. Trout advised him that no apartment was available until at least December, 1979. Brian Peterson, a white tester, appeared on October 2, 1979 and inquired as to a two-bedroom apartment. Mr. Trout advised him that no apartments would be available until at least December but urged that he make a follow-up appointment to bring his wife around to see the apartments. Neither Mr. Hawkins nor Mr. Peterson had any knowledge as to the events which occurred on May 20, 1979 when the Behuls visited Regal Crest Village. Neither had any contact with the Regals.

Both Mr. and Mrs. Regal testified that at no time prior to the commencement of the instant action had they received any complaints whatsoever as to the treatment which anyone, including minority members, were receiving as rental applicants for Regal Crest Village. None of the testers had any contact with the Regals nor did they have any personal knowledge of instructions or specific directions which the Regals may have given to their rental manager concerning rental practices. Further, the Regals testified that in their initial meeting with Mr. Trout, he was informed that it was their policy not to discriminate and that he received specific instructions from them to treat all persons uniformly and fairly. Both Mr. and Mrs. Trout confirmed the instructions which were given at this initial meeting with Mr. Trout concerning the Regals' policy of non-discrimination.

The Regals testified that during the initial rental period a model was utilized at the apartment complex in which was

posted a HUD "Equal Housing Opportunity" poster, When the project was fully rented, the model was no longer used and a HUD "Equal Housing Opportunity" poster was not placed in the lobby. However, a large billboard located at the entrance to the property, contained the "Equal Housing Opportunity" slogan and the HUD insignia. Several years after construction and prior to the visit by the Behuls the sign was repainted and the HUD insignia was covered and only the words "Equal Housing Opportunity" remained visible.

C. Decisons Below

The Decision of the United States Court of Appeals for the Seventh Circuit represents a significant and unjustified expansion of housing discrimination law as it relates to the liability of principals for punitive damages as a result of the actions of their hired agents. Without discussion or citation to any authority, the decision upholds the imposition of punitive damages against the Regals without evidence in the record that said owners acted willfully and in wanton disregard of the plaintiffs' rights, without evidence that said owners knew or should have known of their agent's wrongdoing, and without evidence that said owners authorized, ratified, or fostered the discrimination which was complained of. The panel decision holds that proof of discrimination by the Regals' rental agent coupled with the failure on the part of the Regals to display a HUD fair housing poster and the covering of the HUD insignia on a large sign posted at the entrance of the property, constitutes sufficient evidence to support the $25,000.00 punitive damage award against the Regals.

In pertinent part, the court states as follows:

> **The difference in treatment of black and white testers supports the conclusion that Trout (the on-site rental**

> agent) followed a policy of discrimination in renting units. Plaintiffs argue that if the Regals did not, in fact, know of Trout's policy over this seven month period, it was because they willfully and wantonly ignored it; Ingrid Regal, for example, testified that she took no steps personally to determine whether discrimination was occurring. In addition, the Regals acknowledged that they had removed the "Equal Housing Opportunity" posters from the lobby of the building at the end of the construction phase or when they stopped using the model apartment, sometime in 1978 or early 1979. They also acknowledged that although there was an "Equal Opportunity Housing" sign posted at the entrance to the complex, it had been covered by a second sign announcing "Regal Crest Village of Brookfield" which obliterated the logo and left only the small words "Equal Housing Opportunity" in the lower left hand corner. In light of this evidence and the inferences that can reasonably be drawn from it, the punitive awards made by the jury are not unsupported. (References to Transcript Omitted).

The Decision of the Seventh Circuit Court of Appeals is clearly contrary to the established law of the Seventh Circuit and every other circuit of the country, and expands, without limitation, the potential liability of real estate owners for punitive damages in housing discrimination cases. In effect, it makes all real estate owners strictly liable in punitive damages for the unauthorized, unratified and unfostered actions of their agents. Enforcement of the equal housing laws of this country by way of civil litigation is rapidly expanding. A definitive discussion of an owner's liability for punitive damages by the Supreme Court is essential to the fair and just determination of cases of this type.

REASONS FOR GRANTING THE WRIT

No evidence exists in the record which supports a finding that the petitioners, Walter and Ingrid Regal, acted willfully, wantonly or oppressively toward the Behuls.

The verdict returned by the jury and affirmed by the appeals court found that the Regals acted maliciously, wantonly or oppressively toward the Behuls. Review of the trial record indicates that there was a complete absence of proof presented by the Behuls relative to the conduct and actions of Walter and Ingrid Regal. No evidence exists in the record upon which a reasonable jury could conclude that defendants Walter and Ingrid Regal acted maliciously, wantonly or oppressively toward the plaintiffs.

Punitive damages are not to be allowed for every civil rights violation. *Morehead vs. Lewis*, 432 F. Supp. 674 (N. D. Ill. 1977), aff'd. 594 F.2d 867 (7th Cir. 1979); *Steele vs. Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973). In each case, the court must consider whether or not the defendants acted wantonly or willfully or were motivated in their actions by ill will, malice or desire to injure the plaintiffs. *Bunn vs. Central Realty of Louisiana*, 592 F.2d 891 (5th Cir. 1979); *Jeanty vs. McKey & Poaque, Inc.*, 496 F.2d 1119 (7th Cir. 1974); *Wright vs. Kaine Realty*, 352 F. Supp. 222, 223 (N. D. Ill. 1972). Punitive damages are granted only in those cases brought under 42 U.S.C. Section 1982 in which the court finds that the defendant acted willfully and in wanton and malicious disregard for the rights of the plaintiffs. *Cochetti vs. Desmond*, 572 F.2d 102, 106 (3rd Cir. 1978); *Seaton vs. Sky Realty Company, Inc.*, 491 F.2d 634, 638 (7th Cir. 1974); *Tillman vs. Wheaton-Haven Recreation Association, Inc.*, 367 F. Supp. 860, 864 (D. Md. 1973).

The uncontroverted evidence adduced at trial was that prior to the institution of this litigation there had been absolutely no contact between the Behuls and the Regals. The only contact with Regal Crest Village by the Behuls was the encounter with Daniel Trout, the rental manager, on May 20, 1979. The Regals established a policy in which they had instructed their rental agent that he was not to discriminate. Further, the evidence indicates that the Regals had never received any complaints of any type whatsoever concerning the conduct of their manager prior to the institution of this litigation.

In its instructions, the Court advised the jury as follows regarding the imposition of punitive damages upon an employer for the conduct of his agent:

> You should note that an employer or principal is liable for punitive damages for the conduct of his agent when there is evidence that the employer or principal either was directly involved in or had noticie of the wrongdoing and then did nothing or that the employer or principal authorized or fostered the acts complained of.

Federal Courts award punitive damages when a defendant has acted with actual knowledge that he was violating a protected right or with reckless disregard of whether he was doing so, or with such conscious and deliberate disregard of the consequences of his actions to others that his conduct is wanton. *Knippen vs. Ford Motor Company,* 546 F.2d 993, 1002 (D. C. Cir. 1976); *Fountila vs. Carter,* 571 F.2d 487, 491 (9th Cir. 1978). An employer as set forth above in the instruction is liable for punitive damages for the conduct of his agent when the record shows that he was by action or knowledgeable inaction involved in the wrongdoing or that he authorized, ratified or fostered the acts complained of. *Marr vs. Rife,* 503 F.2d 735, 745 (6th Cir. 1974); *Williams vs. City of New York,* 508 F.2d 356, 361 (2nd Cir. 1974). Punitive damages have not heretofore been assessed against an employer for acts of an employee which were neither directed, participated in or ratified by the employer.

The evidence clearly shows that any discriminatory actions taken by the manager were in violation of his duties and the specific instructions of the Regals. The evidence is clear that the Regals never authorized or fostered any discriminatory conduct. There is absolutely no evidence to show any participation by the Regals in the alleged discriminatory acts which form the substance of the plaintiffs' Complaint.

In *Fort vs. White*, 530 F.2d 1113, 1117 (2nd Cir. 1976), the Court set forth the general rule relative to the imposition of punitive damages as follows:

> . . .It is generally recognized that punitive damages are assessed against an employer for the torts of his employee only where the former "in some way authorized, ratified or fostered the acts complained of." . . .The Court below properly observed that "(t)he employer himself must be shown to have acted or failed to act to prevent known or willfully disregarded actions of his employee to be liable in punitive damages." The findings of fact here established that two building superintendents showed and rented apartments in a racially discriminatory manner. However, there was no evidence that anyone else in the White organization was aware of this behavior, and there was no evidence that anyone else in White's company had similar policies. White testified at the trial on the merits (without any cross-examination at all) that prior to the institution of this lawsuit he had no knowledge or policy of racial discrimination in buildings his company managed. . . . (Citations Omitted).

Similarly, in *Stevens vs. Dobs, Inc.*, 373 F. Supp. 618 (E. D. N. C. 1974), the court refused to award punitive damages against an apartment owner because the acts complained of were not wanton, reckless, malicious or oppressive; defendant's actions were not motivated by malice, ill will or a desire to injure plaintiff; the owner of the apartment did not personally know the plaintiff or intend to exclude him because of his race; and punitive damages were not needed as a punishment or a deterrent. In arriving at its decision, the court noted that:

> Exemplary, or punitive, damages are generally defined or described as damages which are given as an enhancement of compensatory damages because of the wanton, reckless, malicious or oppressive character of the acts complained

of. Such damages go beyond the compensatory damages suffered in the case; they are allowed as a punishment of the defendant and as a deterrent to others. 373 F. Supp. at 623.

Essential to the determination made by the panel was the conclusion that Trout engaged in a policy of discrimination evidenced by the "difference in treatment of black and white testers during the period March, 1979 through October, 1979". To begin with, as indicated in the decision of the panel, it must be remembered that during this seven month period only four tests were completed. More importantly, three of the four tests took place subsequent to the visit to the Regal Crest Village Apartments made by the plaintiffs in the instant case, (May 20, 1979). Only the test completed in March of 1979 came prior to the visit by the Behuls. The other three tests came subsequent to the Behul visit. The evidence adduced at trial is uncontroverted that the Regals were not advised of or informed at any time of the treatment received by the various testers. It was not until the institution of this lawsuit that they became aware of Trout's actions. No evidence was introduced relative to the rental policies of the Regals other than the uncontroverted statements of the Regals that they gave clear instructions not to discriminate.

Plaintiffs argue and the panel decision apparently concludes that "if the Regals did not, in fact, know of Trout's policy over this seven-month period, it was because they willfully and wantonly ignored it. . .". In support of this allegation, the only evidence which was presented at trial and which the panel decision now finds to be sufficient was the failure of the Regals to post in the lobby of their building a HUD "Equal Housing Opportunity" sign. Immediately after construction and during the original rental period, while a model was being used, the Regals had displayed a HUD poster. Once the complex was fully rented, the model was discontinued and the Regals did not place a HUD poster in the lobby of their building. This decision

now allegedly justifies the large punitive damage award made by the jury. The only other evidence which justifies the imposition of punitive damages was the covering of the HUD logo on the large sign at the entrance to the apartment complex. The words "Equal Housing Opportunity" remained clearly visible. The panel decision concludes that in light of *"this evidence"* the jury could reasonably conclude that the Regals acted willfully and wantonly toward the Behuls. Such a conclusion is totally without merit and unjustified by the facts and the applicable case law.

The uncontroverted evidence adduced at trial was that prior to the institution of this litigation there had been no contact whatsoever between the plaintiffs and the Regals. The only contact with Regal Crest Village by the plaintiffs was the twenty minute encounter with Daniel Trout, the rental manager, on May 20, 1979. The evidence was uncontroverted that the Regals had established a policy in which they had advised their rental agents that they were not to discriminate. Further, the evidence indicated that the Regals had never received any complaints whatsoever with respect to alleged acts of discrimination. Any discriminatory actions taken by Trout were in violation of his duties and the specific clear instructions of the Regals. The Regals never authorized or fostered any discriminatory conduct.

There is absolutely no case law authority which justifies the imposition of punitive damages against a real estate owner for the failure to display a HUD "Equal Housing Opportunity" poster. The Decision of the Seventh Circuit changes dramatically the existing case law in this circuit and every circuit of the country.

The evidence which the panel decision finds sufficient to justify the imposition of punitive damages is insufficient to remove from the realm of speculation the jury's determination that the Regals acted in a willful and wanton matter in total disregard of the plaintiffs' rights.

CONCLUSION

The imposition of punitive damages by the jury in this matter represents a gross miscarriage of justice. On Motions After Verdict, the trial court approved the jury award without reference to the underlying facts which support the punitive damage award. On appeal, the decision of the panel fails to set forth sufficient evidence as required by the governing case law to justify the imposition of punitive damages against the Regals and affirms the trial court judgment without reference to any supporting authority. The instant case represents a matter of significant importance in the field of discrimination and fair housing law. Without citation to authority, and in an unpublished Order, the panel decision significantly expands the liability of owners for punitive damages for the discriminatory actions of their agents. Petitioners respectfully petition for a Writ of Certiorari.

Respectfully submitted,

HABUSH, HABUSH & DAVIS, S.C.
Attorneys for Petitioners

By: Kenneth R. Loebel
Michael J. Jassak

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 82-2915

Fred Behul and Erma Behul,
Plaintiffs-Appellees,
vs.

Walter Regal and Ingrid Regal, his wife,
d/b/a/ Regal Crest Village of Brookfield, and
Daniel Trout,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 79 C 960

Argued April 22, 1983

Before
Hon. Walter J. Cummings, Chief Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge

ORDER

Plaintiffs Erma and Fred Behul, an interracial couple, brought this damage action under 42 U.S.C. § 1982 against Walter and Ingrid Regal, the owners of the Regal Crest Village apartment complex, and Daniel Trout, the rental agent employed by the Regals, alleging racial discrimination in the provision of rental housing. The jury found that defendants refused to rent or negotiate with the plaintiffs for the rental of an

apartment, that race was a factor in the defendants' refusal to rent, and that plaintiffs were entitled to compensatory damages in the amount of $2,500 each. In addition, the jury awarded plaintiffs punitive damages in the amount of $12,500 against Walter Regal, $12,500 against Ingrid Regal and $5,000 against Daniel Trout. The trial court denied defendants' motion for judgment notwithstanding the verdict. After reviewing the record, we affirm.

The evidence at trial indicated that the Behuls decided to move to the Milwaukee, Wisconsin, area after Fred Behul graduated from law school in St. Paul, Minnesota. Before the move, Erma Behul worked as an employment representative for the University of Minnesota, a job she planned to retain until she or her husband could find employment in Milwaukee. After seeing a rental advertisement in a newspaper, plaintiffs visited Regal Crest Village of Brookfield, Wisconsin on May 20, 1979, seeking an apartment. Mrs. Behul asked the defendant rental agent, Mr. Trout, if they could see a two-bedroom apartment; Trout indicated that there were none available. Mrs. Behul then asked if there were any other units available — one-bedroom with a den, or one-bedroom —and Trout again said nothing was available. Trout then asked when the Behuls needed their apartment. Plaintiffs indicated that they would like an apartment immediately, but could stay with their parents until June 1 if necessary; all their possessions were in a rental truck, and plaintiffs wanted to move as soon as possible. Trout said again that there were no units available. Mrs. Behul asked whether there would be something available in the future, and Trout said that he did not know. Mrs. Behul asked to see an apartment anyway, and Trout stated that he had a vacant unit but it had already been rented. She again asked to look at it, and Trout took them inside but did not really show them around. Mrs. Behul asked about the heat, the air conditioning and the laundry facilities. Afterwards, the Behuls indicated to Trout that they liked the complex very much and would be interested in coming back at a later date if something opened up. Trout in-

dicated that he did not know when anything would be available in the future. The Behuls left and later rented a two-bedroom apartment at the nearby Fountains Apartment complex for one year.

The parties agree that in order to present a *prima facie* case under 42 U.S.C. § 1982, plaintiffs must show that they were ready, willing and qualified to rent in accordance with the terms of the lease; that defendants refused to rent an apartment or negotiate for the rental of an apartment; that apartments of the type plaintiffs were seeking were available at the time they inquired; and that one reason for defendants' refusal to rent or negotiate was race. See *Sanford v. R.L. Coleman Realty Co.*, 573 F.2d 173 (4th Cir. 1978). Defendants argue primarily that plaintiffs failed to prove that there were any apartments available to satisfy their demand for immediate occupancy or occupancy prior to June 1. The evidence at trial on this issue consisted of Plaintiffs' Exhibit 15 which is a chart showing tenant turnover from January to October 1979, the affidavit of Walter Regal, and the testimony of Daniel Trout. That evidence indicates, and the jury reasonably could have believed, that defendant Trout should have known on May 20 that at least one apartment was available for occupancy on June 1 — Apartment 2 at 13325 West Burleigh. Trout testified and the chart confirms that the tenant gave notice of his intention to move on April 15. According to Trout, the projected move-out date in that notice was June 1 (Tr. 338). Mr. Regal in contrast stated in his affidavit which was read into the record that the move-out date was June 15. The tenants did not in fact vacate until June 19. The jury of course was free to believe that Trout, on May 20, thought he would have an apartment available on June 1. The fact that the district court found in its January 22 order denying summary judgment that no apartments were in fact available as of May 20 for June 1 occupancy says nothing about what Trout thought the situation was on May 20. Neither does the fact that the rent on Apartment 2 was paid through June 30. In addition, a second apartment — Apartment 112 at 13455 West Burleigh — actually became vacant on May 30

after notice was given on April 18. Trout testified that Apartment 112 was not available to the Behuls because it had been promised to another individual in early May, though the prospective tenant did not actually fill out an application until May 28 (Tr. 304-305). Although there was no direct evidence to contradict Trout's testimony, the jury was again free to disbelieve it and infer that the apartment was in fact available on May 20 when plaintiffs visited the complex.

Even if there were no apartments available for June 1 occupancy, there was sufficient evidence for the jury reasonably to conclude that Trout discriminated against plaintiffs by failing to negotiate with them for the rental of an apartment. First, plaintiffs testified that Trout told them twice that there were no apartments available even before he asked when they wanted to move in. Second, as of May 20, defendants had received three other notices of intent to vacate. Apartment 207 at 13405 West Burleigh, for example, actually became vacant on June 5. Although Trout claimed that it was not available for occupancy until July 1 because of repairs, this information was not conveyed to the Behuls, who might have been willing to negotiate about the repairs. Finally, the evidence indicated that Trout did not take the Behuls on a tour of the complex; agreed after two requests to give them a tour of an apartment but did not make a "hard sell;" and told the plaintiffs that he did not know if any apartments would be available in the future. In contrast, a white tester who visited the complex just three days later inquiring about a two-bedroom apartment "as soon as possible" was treated to a 15-minute discourse on the facilities at the complex volunteered by Trout, shown a model apartment at Trout's suggestion, told that at any particular time there were from three to five apartments available for lease, and that the complex generally had an 85% occupancy rate (Tr. 67). In sum, the record reflects sufficient evidentiary support for the jury verdict in this case.*

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*Defendants briefly argue that the Behuls were not qualified to rent an apartment because they had no local employment for several months. Mrs. Behul, however, kept her job in St. Paul until she was able to find a local job.

Defendants also argue that there was no evidence to support an award of punitive damages against the Regals and that the awards of compensatory and punitive damages were excessive. Compensatory damages can be based on out-of-pocket expenses as well as mental and emotional distress suffered by plaintiffs as a result of the violation of their civil rights. *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 190 (7th Cir. 1982); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974). Fred Behul testified that after they were dissuaded from renting at Regal Crest Village, the Behuls took an apartment at the Fountains Apartment complex. Those apartments were not as luxurious as the Regal Crest apartments, not as well built, and did not have the recreation facilities — tennis courts, sauna, swimming pool — that the Regal Crest complex had. Mr. Behul testified that he incurred out-of-pocket expenses in seeking and using alternative recreation facilities. After a year, the Behuls decided that they wanted to live in a nicer place than the Fountains, and moved to the Fox Croft. Mr. Behul testified that he incurred out-of-pocket expenses for apartment hunting, moving, decorating, and tying up a four-month security deposit. The Behuls sought compensation for the inconvenience and expense of living at the Fountains and having to move again a year later.

Both Mr. and Mrs. Behul testified to the emotional distress suffered as a result of the defendants' refusal to rent. They were upset and angry at what they believed to be a discriminatory refusal to rent. They felt humiliated about having to extract information from Trout question by question because he appeared unwilling to volunteer information. They felt that their marriage was being called into question because they were an interracial couple. Mrs. Behul felt that because of her race, her husband was unable to live in the kind of setting he desired.

The jury awarded each plaintiff $2,500 in compensatory damages. In this Circuit damages for the intangible injuries of victims of housing discrimination have ranged between $500 and $5,000. *Phillips v. Hunter Trails Community Ass'n, supra,*

685 F.2d at 190. In that case, this Court sustained compensatory damages of $10,000 each to the husband and wife plaintiffs when actual out-of-pocket expenses were only $2,675. *Id.* at 190-191. The award of compensatory damages in this case was not excessive.

Defendants also claim that the award of punitive damages against Walter and Ingrid Regal in the amount of $12,500 each is without support in the record. They argue that if Mr. Trout discriminated against plaintiffs in responding to their rental demands, he did so without authorization or approval by the Regals, because their instructions to him had been to rent in a nondiscriminatory manner.

Punitive damages cannot be assessed against the Regals purely on the basis of respondeat superior; rather plaintiffs must show that the Regals acted with wilful and wanton disregard of plaintiffs' rights, see *Seaton v. Sky Realty Col.*, 491 F.2d 634, 638 (7th Cir. 1974); or that they knew of the wrongdoing on the part of Trout and did nothing; or that they authorized, ratified or fostered the acts complained of, see *Fort v. White*, 530 F.2d 1113, 1117 (2d Cir. 1976). Plaintiffs rely primarily on two factors: the experience of testers over a seven-month period to show a pattern of racial discrimination, and the Regals' failure to display prominently equal housing opportunity information and the related logo.

Even though no white tester appeared on the same day as the Behuls, the testing evidence was properly admitted to show the existence of a discriminatory rental policy. See *Northside Realty Associates v. United States*, 605 F.2d 1348, 1354)1355 (5th Cir. 1979); *Smith v. Anchor Building Corp.*, 536 F.2d 231, 234-235 (8th Cir. 1976). And based on the testers' testimony, a reasonable jury could have concluded that there existed a discriminatory rental policy at Regal Crest Village. Testers from the Milwaukee Fair Housing Council visited the complex four times between March and October 1979. On March 24 the black tester was told by Mr. Trout that no two-bedroom units were available until after June 1; she was not given information

about the complex and was not given a "hard sell" about the facilities; she received no follow-up phone calls (Tr. 23-27). The white tester visiting the same day was told that a two-bedroom apartment might be available in mid-April; Trout volunteered information about the complex and gave her a tour of the facilities; and she received three follow-up phone calls (Tr. 36-40). On May 23 the black tester was told by Mr. Trout that there were no two-bedroom vacancies; that the complex was close to 100% occupied so that there were no apartments available for showing; and she received no follow-up phone calls (Tr. 53-55). The white tester visiting the same day was told that the occupancy rate was generally 85%; that at any particular time there were from three to five apartments available; she was told in detail about the facilities; she saw an empty apartment; and she received a follow-up call (Tr. 67-71). On September 27 the black tester was told by Mr. Trout that there were no two-bedroom units available until December (Tr. 110). The white tester visiting on the same day was told that a two-bedroom apartment would be available on the first of November (Tr. 122). On October 1 the black tester was told by Mr. Trout that a two-bedroom unit might be available in December; he was not given a tour of an apartment or of the complex (Tr. 84-86). The white tester visiting the next day was told that an apartment might be available in December; he was given a tour of an occupied apartment and the grounds; he received one telephone call from Trout to set up an appointment to return to the complex, and he received a second call to ask if he was still interested after he failed to keep the appointment (Tr. 97-99).

The difference in treatment of black and white testers supports the conclusion that Trout followed a policy of discrimination in renting units. Plaintiffs argue that if the Regals did not in fact know of Trout's policy over this seven-month period, it was because they wilfully and wantonly ignored it; Ingrid Regal, for example, testified that she took no steps personally to determine whether discrimination was occurring (Tr. 390). In addition, the Regals acknowledged that they had

removed the equal housing opportunity posters from the lobby of the building at the end of the construction phase or when they stopped using the model apartment sometime in 1978 or early 1979 (Tr. 368). They also acknowledged that although there was an equal opportunity housing sign posted at the entrance to the complex, it had been covered by a second sign announcing "Regal Crest Village of Brookfield," which obliterated the logo and left only the small words "Equal Housing Opportunity" in the lower left-hand corner (Def. Ex. 103). In light of this evidence and the inferences that can reasonably be drawn from it, the punitive awards made by the jury are not unsupported.

Affirmed.

United States Court of Appeals
For the Seventh Circuit

July 6, 1983

Fred Behul and Erma Behul,
Plaintiffs-Appellees

No. 82-2915

vs.

Walter Regal and Ingrid Regal, his wife,
d/b/a/ Regal Crest Village of Brookfield:
and Daniel Trout
Defendants-Appellants

JUDGMENT

Before: Hon. Walter J. Cummings, Chief Judge; Hon. Richard A. Posner, Circuit Judge; Hon. Thomas E. Fairchild, Senior Circuit Judge.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 2, 1983

Before
Hon. Walter J. Cummings, Chief Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge

Fred Behul and Erma Behul,
Plaintiffs-Appellees,
No. 82-2915

vs.

Walter Regal and Ingrid Regal, Etc.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 79 C 960
John W. Reynolds, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above entitled cause by defendants-appellants Regal, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.